

October 10 Statement was responsive to Ms. Cooper's question as he understood it from Ms. Marshall. Mr. Bramlett further testified that he would never try to convince the FCC or anyone familiar with the broadcasting industry that his Alabama radio stations had hired 12 non-minorities in the one-year Reporting Year and seven minorities only in the balance of the seven-year License Period. (Paragraphs 42-47, supra.)

73. In sum, the misstatement in the October 10 Statement was the product of Ms. Marshall's continued good faith misunderstanding, never discussed with Mr. Bramlett, as to the number of hires during the License Period, and Mr. Bramlett's failure to catch this mistake. The misstatement was not intentional.

74. The evidence in this case makes it abundantly clear that there was a total misunderstanding between counsel and DBI over the facts; Ms. Marshall was heading down one track and DBI down another parallel track. The misunderstanding was exacerbated by the different dates for which the FCC requested information in the July 3 letter (November 1, 1985 to November 1, 1988) and the March 15 Letter (November 1, 1987 to November 1, 1988). That Mr. Bramlett and Ms. Marshall were on different wavelengths throughout this process is demonstrated by the following question and answer at Mr. Bramlett's deposition (Id. at 90-91):

Q (Mr. Schonman) What was it that caused you to have this revelation as to what the Commission was actually requesting?

A Well, I'm sure it was conversations with Susan [Marshall in December 1991] that it became clear to me what they were looking for. If -- and I know it looks pretty wild, because when I got this designation for here, and I read all of this background, and my biggest fear -- I mean, I almost, I could feel my heart pound, "My God! This is all true, and how can I deny this?" I mean, this was -- and still I didn't focus on the 20 hires and all of that. But as I read this, this is the truth, and I'm in trouble, the whole truth. With a few exceptions, technical little things in there, it is all the truth. We got down to this point, and every filing in here was the truth as I knew it. Then when I realized -- and if you talk to somebody like in Susan's position, she never got on to the fact that I am not talking about all of the hires. In her mind, she probably was talking, or thinks she was talking about all of the hires. But I say to you and to anybody else as a broadcaster, seven minorities over a period of six years and then twelve in one year, no minorities? Am I going to submit to you that that is all of the people that has ever worked at two radio stations? Never in your life would I say that, because that was the farthest thing from my mind. So now, as we get over to this, this was like, "My God! Here is what they have been asking for all along." And I still couldn't do the job classification -- the job classifications -- I couldn't do the recruitment sources because, as we discussed earlier, that was all over the sky.

75. The unintentional nature of the misstatement is underscored by DBI's conduct in connection with the January 13 Response. In this filing DBI voluntarily disclosed the existence of five times the number of hires during the License Period than had previously been reported. This action belies an intent to deceive. It makes no sense to suggest that DBI intended to deceive the Commission in the Supplemental Report and the October

10 Statement but suddenly gave up its ruse or changed its mind. While it is true that the FCC had demonstrated there must have been at least 32 hires during the License Period, there were other ways to respond to this assertion if DBI's intent all along had been to deceive: DBI could have stated that it only had records with respect to 20 hires although there may have been more; or DBI could have come up with 12 or so more hires and satisfied the FCC's concern. The surest way to expose deception was to do as DBI did and disclose that there were 120 additional hires during the License Period.^{17/} This conduct is not consistent with an intent to deceive.

76. Finally, the ultimate factor demonstrating the absence of deceptive intent is the utter lack of motive on DBI's part to inflate the number of hires. The statistical guideline utilized by the Commission in evaluating the effectiveness of an EEO program is a comparison of the percentage of minority hires during the relevant period to the percentage of minorities in the applicable labor force. Amendment to Part 73 of the Commission's Rules Concerning Equal Employment Opportunity in the Broadcast Radio and Television Services, 2 FCC Rcd 3967, 3974 (1987) (subsequent history omitted). Under the so-called "50% of parity test," a licensee complies with the benchmark if the percentage

^{17/} DBI's candor is further demonstrated by the fact that it disclosed the hiring of 57 individuals whom it did not consider to have been employees. DBI could have opted to disclose the 83 hires only on the theory that the remaining 57 were outside the scope of the inquiry.

of minorities hired during the relevant period equals or exceeds 50% of the percentage of minorities in the applicable labor force. Under the worst case scenario -- assuming all 140 hires were employees for FCC purposes -- the percentage of minority hires during the License Period (9 of 140, or 6.43%) substantially exceeds the 50% of parity benchmark (50% of 7.4%, or 3.7%). Moreover, assuming 104 hires as the Commission concluded in the HDO, the percentage of minority hires during the License Period (8 of 104, or 7.69%) exceeds 100% of parity. (Paragraphs 11-12, supra.)^{18/}

77. In conclusion, Mr. Bramlett was admittedly careless in failing to notice the misstatements concerning the number of hires during the License Period, in failing to list Blacks in the 1983 and 1987 Annual Employment Reports^{19/} and in making certain errors in the Renewal Applications. This shortcoming, however, does not constitute intentional misconduct. The record

^{18/} It is beyond cavil that Ms. Marshall had no reason or motive to dissemble. There is no reason to doubt that she believed the number of new hires in the License Period was approximately 20 when she drafted and filed the April 18 Response and the October 15 Response. Given this fact, in order for Mr. Bramlett to have knowingly misrepresented the number of hires, he would have had to focus on the representation in the April 18 Response (even though he had not discussed it with Ms. Marshall) and its falsity, and nonetheless fail to discuss the mistake with Ms. Marshall; that is, intentionally take advantage of Ms. Marshall's inadvertent mistake -- hardly a likely scenario. It is likewise inconceivable that an innocent mistake in the April 18 Response was noticed for the first time and knowingly adopted by Mr. Bramlett in the October 15 Response.

^{19/} Failure to note minority hires in an EEO report is hardly consistent with an attempt to deceive the Commission in order to aggrandize the Stations' EEO performance.

reveals neither an intent nor a motive to deceive. The Misrepresentation Issue should accordingly be resolved in DBI's favor.^{20/}

B. The EEO Program Issue.

78. Section 73.2080(b) of the Commission's Rules requires licensees to "establish, maintain, and carry out a positive and continuing program of specific practices designed to ensure equal opportunity in every aspect of station employment policy and practice." In specifying the EEO Program Issue, the Commission noted the following:

Review of all submissions reflect that the licensee had 104 hiring opportunities during the license term. The licensee reported contacting seven general sources during the license term and receiving some minority applicants. However, the frequency of contacts with recruitment sources as well as the number, race, or gender of applicants for positions during the license term is unclear because the licensee reported recruitment and applicant data only for positions for which it considered and/or hired Blacks. The licensee has presented little evidence that it consistently contacted recruitment sources likely to refer minorities when vacancies occurred or that it evaluated its employment profile and job turnover against the availability of minorities in its recruitment area pursuant to Sections 73.2080(b)(2) and (3) of the Commission's Rules, 47 C.F.R. Sections 73.2080. It is unclear how it could meaningfully self-assess its EEO program, including

^{20/} DBI believes that the totality of evidence in this case renders unnecessary any observation of the demeanor of the witnesses by the Presiding Judge. In DBI's view, the material facts of this case, and inferences to be drawn therefrom, are undisputed. No useful purpose would be served by conducting a hearing under these circumstances. See WXBM, Inc., 6 FCC Rcd 7356, 7359 (A.L.J. 1991).

the productivity of its recruitment sources as it claimed, with such limited and incomplete information. In addition, we question the licensee's self-assessment of its EEO efforts when, in one response, it argues the success of a program that resulted in the hiring of seven minorities out of 20 hires during the license term and, in a later response, still claims success although it had only recently discovered that it had 84 more hires than previously reported.

HDO at paragraph 13.

79. DBI does not dispute that there were deficiencies in its EEO program during the License Period. One basic flaw in the program was the failure to maintain records documenting its recruitment efforts. This failure is in turn responsible for many of the deficiencies cited by the Commission in the HDO. For example, due to the absence of records DBI is unable to state "the frequency of contacts with recruitment sources as well as the number, race, or gender of applicants for positions during the license term." Such data was presented "only for positions for which it considered and/or hired Blacks" because, to the extent the Stations kept records, such records pertained to minority hiring efforts. (Paragraph 13, supra.)

80. The record further reflects that DBI did not "consistently contact recruitment sources likely to refer minorities when vacancies occurred", although DBI's efforts in this area improved as the License Period progressed. Nor did DBI evaluate its employment profile and job turnover against the availability of minorities in its recruitment area. Mr. Bramlett had no such

formal evaluation process and performed no statistical analysis of the Stations' EEO performance. (Paragraphs 13, 17-19, supra.)

81. This is not to say that DBI did not take its EEO obligations, as it perceived them, seriously. Throughout the License Period Mr. Bramlett attempted to obtain minority applicants and to hire qualified minorities and was keenly focused on being nondiscriminatory in hiring. In addition, Mr. Bramlett evaluated the effectiveness of his EEO performance on an ongoing basis, albeit informally, throughout the License Period. He judged such effectiveness by the extent to which minority applicants were produced. Mr. Bramlett believed, and continues to believe, that the Stations' EEO program during the License Period was effective. As noted above, the Stations hired nine minorities during this period and substantially exceeded the 50% of parity test under any factual scenario. Moreover, commencing in 1989, DBI adopted a formal EEO program modeled after the NAB guidebook. (Paragraphs 10-12, 17-20, supra.)

82. In assessing the sanctions warranted with respect to a deficient EEO program, the Commission examines not only the licensee's ability to demonstrate compliance with Section 73.2080(b), but also the results of the EEO program. Possible sanctions range from reporting conditions to forfeitures to short-term renewals. DBI is aware of no decision which has denied license renewal based on noncompliance with Section 73.2080(b), absent intentional misrepresentation or discrimination. (See HDO at paragraph 6.)

83. Under Commission precedent, reporting conditions are typically imposed when a licensee has a statistically acceptable minority hiring record but has not engaged in consistent recruitment efforts or maintained adequate records to permit self-assessment of its EEO program. See, e.g., Radio Ohio, Inc., 7 FCC Rcd 6355 [1992] (WRFD) (reporting conditions imposed where licensee met 50% of parity guidelines (3 minority hires out of 20 hiring opportunities with a 9.7% Black labor force) but had sporadic recruitment efforts, did not adequately self-assess its recruitment program and did not maintain adequate records for self-assessment); Goodrich Broadcasting, Inc., 7 FCC Rcd 6655 [1992] (WSNZ/WSNX-FM) (reporting conditions imposed where 2 of 42 hires were Black in a market with an 8.5% Black labor force, station made limited effort to utilize minority specific organizations for referrals, but failed to collect data to ensure adequate self-assessment). Where a licensee has a statistically unacceptable minority hiring record, and has otherwise not engaged in consistent recruitment efforts or maintained adequate records to permit self-assessment, a forfeiture is imposed in addition to reporting conditions. See, e.g., In Re Applications for Renewal of Certain Broadcast Stations Serving Communities in the States of Alabama and Georgia, 6 FCC Rcd 5968, 5970 [1991] ("In Re Alabama") (WHBP(AM)) (reporting conditions and a \$9,000 forfeiture imposed where no minorities hired out of 19 hiring opportunities in a market with a 16.9% Black labor force, and licensee did not adequately self-assess its EEO program until the

end of the license term); In Re Alabama, supra at 5972 (WQPW(FM)) (reporting conditions and a \$15,000 forfeiture imposed where one Black hired in the last year of the license term out of 27 hiring opportunities in a market with a 26.3% Black labor force, and licensee failed to notify recruitment sources of specific openings and failed to meaningfully self-assess its EEO program). In especially egregious circumstances, a short-term renewal is imposed in addition to reporting conditions and a forfeiture. See, e.g., In re Certain Broadcast Stations Serving Communities in the State of Louisiana, 7 FCC Rcd 1503, 1507-1508 [1992] (KRMD(AM)/KRMD(FM)) (short-term renewal, reporting conditions and \$20,000 forfeiture imposed where no minority hires out of 34 hiring opportunities with a relatively high 30.6% minority labor force, inadequate recruitment efforts and failure to self-assess its EEO program); WBXM-FM, Inc., supra (short-term renewal, reporting conditions and \$20,000 forfeiture imposed where no Blacks hired out of 80 hiring opportunities in a market with a 14.3% Black labor force, failure to maintain adequate applicant flow information and failure to meaningfully self-assess EEO program).^{21/}

^{21/} Inaccurate EEO-related reporting in annual employment reports, renewal applications and in response to FCC inquiries have generally not affected the sanction imposed by the FCC, absent an intent to deceive. See e.g., Certain Broadcast Stations Serving Communications in the State of Arkansas, 6 FCC Rcd 4938 [1991] (KARN(AM)) (where six of the licensee's seven annual employment reports in its license term were inaccurate, FCC held that the licensee "did not exercise the type of oversight we expect of all licensees when filing required

(continued...)

84. DBI's EEO record reflects a failure to comply with the provisions of Section 73.2080(b) in that DBI engaged in sporadic recruitment efforts, did not adequately and formally self-assess its recruitment program and did not maintain adequate records for self-assessment for each job vacancy. On the positive side of the ledger, DBI did hire nine Blacks, interviewed several minority applicants who were not hired, offered positions on at least two occasions to minorities who declined, and substantially exceeded the 50% of parity guideline over the License Period. DBI is sensitive, however, to the fact that the record reflects inconsistencies and inaccuracies in reporting which, though not intentional, were admittedly the product of DBI's own carelessness. Under these circumstances, DBI acknowledges that some sanction would be appropriate.^{22/}

III. CONCLUSION

85. For the reasons set forth above, DBI urges the Presiding Judge to grant summary decision in the manner

^{21/} (...continued)

submissions" and cautioned licensee to verify the accuracy of its reports in the future, but levied no sanction) (id. at 4939); In re Applications of Liggett Broadcasting, Inc., 7 FCC Rcd 4520 (1992) (WLHT) (minorities undercounted on three annual employment reports due to "inadvertent error," reporting conditions imposed where licensee had three Black hires out of 27 hiring opportunities (11.5%) in a market with a 4.3% Black labor force but had inadequate record keeping and self-assessment).

^{22/} DBI is prepared to discuss an appropriate sanction with Bureau counsel prior to the submission of the Bureau's response to this Motion in an effort to present a joint recommendation to the Presiding Judge.

recommended herein on the issues designated against DBI in this proceeding and to grant the Renewal Applications with appropriate sanction.

Respectfully submitted,

DIXIE BROADCASTING, INC.

By:


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January 8, 1993

EXHIBIT 1

J. Mack Brandlett
Vice-President
Dixie Broadcasting, Inc.
401 14th St., S.E.
Decatur, Alabama 35602

Re: Stations WDCS(AM)/WIFN(FM)
Decatur, Alabama

Dear Mr. Brandlett:

This refers to your pending renewal applications for the above-referenced stations. During a telephone conversation on January 24, 1962, Hope Cooper spoke with your attorney regarding the EEC information that you have provided in response to several inquiries from this office. This letter is a follow-up to that conversation.

In your last inquiry response, you stated that during the license term you had 13 hires and that 57 people worked at the stations during the license term but were not considered employees. We ask that you specifically state whether these people are included in the 13 hires or whether they are in addition to the 13 hires. We also request a further explanation as to what these individuals did at the stations and why you did not consider them employees. In addition, we request that for all hires, regardless of the length of employment, you provide the exact date of hire, the title, the 395-F classification, and full or part-time status of the position and the name, race, gender and date of termination of the hiree.

Finally, we request a further explanation for the amendment of your renewal application in which you stated that the total number of hires occurring during the reporting year was 12 and not 16. You stated that four individuals listed as hires only worked temporarily at the stations and therefore were not considered employees. Please explain their status in more detail.

7
This letter confirms that your response to this request is due on January 31, 1952. Additionally, send a copy of your response to David E. Honig, Esquire, counsel for IAFAP, et al. Should you have any questions regarding this letter, please contact Mr. Iota Cooper at (202) 632-7009.

Sincerely,

Glenn A. Wolfe
Chief, SEC Branch
Enforcement Division
Mass Media Bureau

cc: Robert Marshall, Esquire ✓
David Honig, Esquire

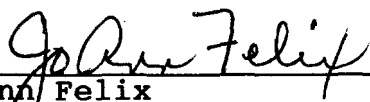
/s/NEI/SEC/COOPER/LOUNT/TABLE

CERTIFICATE OF SERVICE

I certify that the foregoing Motion for Summary Decision of
Dixie Broadcasting Inc. was served on the 8th day of January,
1993, by hand-delivering a copy thereof to the following:

James W. Shook, Esquire
Gary P. Schonman, Esquire
Mass Media Bureau
Federal Communications Commission
2025 M Street, N.W., Suite 7212
Washington, D.C. 20554

Honorable Arthur I. Steinberg
Administrative Law Judge
Federal Communications Commission
2000 L Street, N.W., Room 228
Washington, D.C. 20554



JoAnn Felix

January 8, 1993